

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 21, 2009

STATE OF TENNESSEE v. STACY N. MOONEYHAN

Appeal from the Criminal Court for Sumner County
No. CR896-2004 Dee David Gay, Judge

No. M2009-00424-CCA-R3-CD - Filed March 9, 2010

Appellant, Stacy N. Mooneyhan, was convicted in Sumner County of rape of a child, a Class A felony; incest, a Class C felony; aggravated sexual battery, a Class B felony; and two counts of especially aggravated sexual exploitation of a minor, Class B felonies. He was sentenced to twenty-three years for rape of a child, four years for incest, ten years for aggravated sexual battery, and twelve years for each of the especially aggravated sexual exploitation of a minor convictions. Some of the sentences were ordered to run consecutively, for a total effective sentence of thirty-five years. Appellant appealed his convictions and sentence. *State v. Stacy N. Mooneyhan*, No. M2006-01330-CCA-R3-CD, 2007 WL 3227066, at *1 (Tenn. Crim. App., at Nashville, Oct. 30, 2007), *perm. app. denied* (Tenn. Jan. 18, 2008), *reh'g denied*, (Tenn. Crim. App. Mar. 11, 2008) (“*Mooneyhan I*”). On appeal, this Court affirmed Appellant’s convictions, but remanded for resentencing “because of irregularities in the sentencing process.” *Id.* The trial court held a new sentencing hearing on remand. On remand, the trial court sentenced Appellant to the presumptive sentence for each offense: twenty years for rape of a child, three years for incest, eight years for aggravated sexual battery, and eight years for each especially aggravated sexual exploitation of a minor conviction. Once again, the trial court ordered some of the sentences to run consecutively, for a total effective sentence of thirty-six years. Appellant appeals his sentence for the second time, arguing that the trial court erred in ordering consecutive sentences. Because we determine that the trial court properly sentenced Appellant, the judgments of the trial court are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

John Pellegrin, Gallatin, Tennessee, for the appellant, Stacy N. Mooneyhan.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General, and C. Rondal Blanton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

According to this Court’s opinion in *Mooneyhan I*, Appellant was indicted and convicted of crimes that involved his biological daughter. *Id.* Specifically:

[The victim] was taking a bath and her father came into the bathroom. She said she asked him to hand her a towel, but he did not. She said that instead, he told her to get out of the bathtub and get onto the floor. She said he touched her breasts and “private parts,” penetrated her vagina with his penis, and took photographs of her and of the penetration. She said that she complained that the penetration hurt but that the defendant told her it would be over soon. The victim identified two photographs as those taken by the defendant. She said the defendant gave her various explanations for his actions. He told her that it was punishment, that it was because he was her father, and that it was because she looked like her mother.

Id. At the conclusion of the trial, the jury found Appellant guilty of rape of a child, a Class A felony; incest, a Class C felony; aggravated sexual battery, a Class B felony; and two counts of especially aggravated sexual exploitation of a minor, Class B felonies. Appellant appealed his convictions and sentence based on an argument that his sentences were enhanced contrary to *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005). *Stacy N. Mooneyhan*, 2007 WL 3227066, at *16. He also challenged the trial court’s decision to impose consecutive sentencing. On review, we determined that the trial court did not make the requisite findings to support consecutive sentencing and that “the defendant [should be resentenced] under the sentencing act as it existed prior to June 7, 2005, or alternatively, under the present law if the defendant executed a written waiver allowing sentencing under the law effective June 7, 2005.” *Stacy N. Mooneyhan*, 2007 WL 3227066, at *18.

On remand, the trial court held a sentencing hearing. At the hearing, the trial court acknowledged that Appellant was inappropriately sentenced in violation of *Blakely* due to

the status of the sentencing laws in effect at the time of Appellant's original sentencing hearing. Appellant did not chose to file a waiver of ex post facto provisions, so the trial court proceeded by sentencing Appellant by looking at "what the law requires for a pre-June 7th, 2005 case or hearing" and acknowledged that Appellant would receive the "minimum sentences on every conviction" with exception of the rape conviction, for which Appellant would be sentenced to the midpoint in the range, unless there were any mitigating circumstances to be considered.

At the hearing, Appellant's mother, Pat Mooneyhan, testified that Appellant was a good child who attended school and graduated from high school before starting work. Once Appellant got a job, he helped to buy groceries and pay bills at the house. After Appellant left home in his early 20's he maintained steady employment.

The trial court found that no mitigating factors applied and, as a result, Appellant was sentenced to twenty years for rape of a child, three years for incest, eight years for aggravated sexual battery, and eight years for each especially aggravated sexual exploitation of a minor conviction. The State argued that consecutive sentencing was appropriate under Tennessee Code Annotated section 40-35-115(b)(5), that Appellant was:

[C]onvicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim . . . , the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim

T.C.A. § 40-35-115(b)(5). The trial court determined that consecutive sentencing was appropriate on this basis and ordered Appellant's sentence for rape of a child and incest to run concurrently, but ordered the sentence for aggravated sexual battery to run consecutively to the sentences for rape and incest. The trial court further ordered the especially aggravated sexual exploitation of a minor sentences to run concurrently to each other but consecutively to the sentence for aggravated sexual battery. Appellant's total effective sentence was thirty-six years.

Appellant filed a timely notice of appeal.

Analysis

On appeal, Appellant argues that the trial court "made statements and gave reasons for imposing some sentences consecutively but failed to properly articulate those reasons and failed to make reference to anything in the record" to support consecutive sentencing.

Appellant does not challenge the length of the sentences imposed. The State, on the other hand, insists that the trial court properly imposed consecutive sentencing by being “thorough and clearly stat[ing] its reasons for ordering consecutive sentences.”

“When reviewing sentencing issues . . . , the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct.” T.C.A. § 40-35-401(d). “However, the presumption of correctness which accompanies the trial court’s action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant’s potential for rehabilitation, the trial and sentencing hearing evidence, the pre-sentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant’s statements. T.C.A. §§ 40-35-103(5), -210(b); *Ashby*, 823 S.W.2d at 169. We are to also recognize that the defendant bears “the burden of demonstrating that the sentence is improper.” *Ashby*, 823 S.W.2d at 169.

A trial court may impose consecutive sentences upon a determination that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exists. This section permits the trial court to impose consecutive sentences if the court finds, among other criteria, that:

- (1) The defendant is a professional criminal who has knowingly devoted the defendant’s life to criminal acts as a major source of livelihood;
- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant’s criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
- (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;

(5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

(6) The defendant is sentenced for an offense committed while on probation;
or

(7) The defendant is sentenced for criminal contempt.

T.C.A. § 40-35-115(b). When imposing a consecutive sentence, a trial court should also consider general sentencing principles, which include whether or not the length of a sentence is justly deserved in relation to the seriousness of the offense. *See State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002). The imposition of consecutive sentencing is in the discretion of the trial court. *See State v. Adams*, 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997).

Appellant was convicted of rape of a child, a Class A felony; incest, a Class C felony; aggravated sexual battery, a Class B felony; and two counts of especially aggravated sexual exploitation of a minor, Class B felonies.

In this case, the trial court based the imposition of consecutive sentencing on Tennessee Code Annotated section 40-35-115(b)(5), more than two convictions of offenses involving child sexual abuse. After making it clear that the trial court had considered the evidence at trial and sentencing as well as the presentence report, the principles of sentencing, the nature and characteristics of the criminal conduct involved, the mitigating factors, sentencing practices in Tennessee, the Appellant's statements on his presentence report and the potential for rehabilitation, the trial court made the following statement with regard to consecutive sentencing:

The last issue, whether or not these sentences shall be served concurrently or consecutively. . . . We need to see whether 40-35-115(b)(5) applies. . . .

Let me address number one, the relationship between the defendant and the victim. This is a biological father and his own daughter. This is absolute, total depravity. This is complete, absolute perversion. Naked pictures of yourself with your underwear on in the act of intercourse with your own

daughter, and you place those pictures [on a camera] in a dresser with all the other naked ladies that you look at.

. . . .

Time span of defendant's undetected sexual activity. At trial the defendant - - or the victim testified about what happened, and she said, My dad had been hurting me before that. Detective Hardin testified at the sentencing hearing that this started with an incident or oral rape when she was seven years old. Other incidents throughout the six- or seven-year time period in which [the victim] related being raped, time span. Father, daughter, six, seven years.

The nature and scope of the sexual acts I'm to consider. Fondling and touching, oral sex, penetration and intercourse, taking picture of her in sexual acts, showing pictures of her with your other naked ladies' pictures.

Reasons, punishment. You [told the victim you] could do it because you were her father; lastly, because she looked so much like her mother.

Lastly, I considered the extent of residual physical and mental damage to the victim. I don't know how I can measure the pain from penal penetration at an early age. I don't know how to measure that. I'm not smart enough to measure that. And the memories that will last with that person as long as she lives. How do you measure the mental damage by being told that the abuse occurred because she looked like her mother? And the file reflects, the evidence reflects that she said that's why I tried to change my looks. Or it was punishment or it was because you could. How do you measure damage from a broken family?

. . . .

The record reflects today that she has been adopted and all former ties with her mother, her father, both sides of the family are done.

. . . .

The damage here physically, mentally, emotionally is immense. It's unmeasurable. It's permanent. She's going to be away from her mother and her father for the rest of her life. She's going to be raised by the world, not you and not her own mother, raised by the world because of what you did.

How do you measure that? The residual damage will last with her her lifetime and possibly the lifetimes of her children. It's immeasurable.

For those reasons I find that consecutive sentences are appropriate, going through each and every one of the factors.

Rule 32(c)(1) of the Tennessee Rules of Criminal Procedure requires that a trial court specify the reasons for imposing a consecutive sentence. Appellant complains that the trial court failed to do so. As stated above, Tennessee Code Annotated section 40-35-115(b)(5) requires a trial court to consider "the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;"

In our review, we determine that the trial court herein thoroughly and completely considered the criteria of Tennessee Code Annotated section 40-35-115(b)(5) prior to the imposition of consecutive sentences and stated those reasons on the record. The trial court took time to examine each criteria and related it to the facts of the case. The trial court did not abuse its discretion. The effective sentence of thirty-six years is more than appropriate for the crimes committed by Appellant. This issue is without merit.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE